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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

COMMENTS

Dennis C. Brown and Robert H. Schwaninger ("we" or "Brown and Schwaninger")
respectfully submit our Comments in the above captioned matter.

Brown and Schwaninger represent a number of persons before the Commission who operate and who desire to operate commercial radio communications facilities. Many of our clients would appear to be eligible as among those entities designated for assurance of an opportunity to participate in the future of the telecommunications business. Accordingly, we offer our comments on a limited number of the areas of concern raised in the Commission's Notice of Proposed Rule Making in the instant matter.

The Commission Should Avoid Excessive Work

As a general rule, the Commission should avoid making work for itself. However, one proposal would find the Commission making a great deal of work for itself, namely, the

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proposed auctioning of spectrum to applicants for Specialized Mobile Radio Systems. The Commission has a long history of distinguishing between the lease of radio equipment coupled with multiple licensing of end users, and the provision of radio communications service with blanket licensing of a single licensee. The distinction is too well established for the Commission to cast it aside at this time, either by banning community repeater operation or by auctioning spectrum for a community repeater facility which provides no radio communication service.

If the Commission were to subject SMR applications to auctions, it would never receive another SMR application. Instead, the Commission would make 10 to 15 times as much work for itself by driving every vendor to community repeater operation, which does not incorporate the provision of a radio communication service to subscribers.¹ The processing of multiple license applications for community repeaters would quickly drain the budget benefit received from auctioning a substantial amount of spectrum. Accordingly, to avoid the administrative problems which would result from a dead stop in SMR licensing and a rapid migration to community repeater operation, the Commission should exempt SMRs from applications granted by auction.

¹ In the case of wide area operations, the Commission could make thousands of times as much work for itself by driving operators to classify themselves as community repeater operators, rather than as SMRs. Were that to happen, the Commission could find itself processing applications at the rate of 1000 to 1, compared to exempting SMRs.

"Service" Defined

The Commission needs to resolve an inconsistency in its application of the statute. At some points in its NPRM, it refers, we think, correctly to the use of the spectrum actually proposed by a given applicant as the "service". At other points, *see, e.g.*, NPRM at para. 33, the Commission attempts to apply the term "service" to a broad category of potential users or uses. We think that to apply the statute as it was written, the Commission should look to the use of the spectrum proposed by each specific applicant and disregard any other potential use of the spectrum. We suggest that the Commission can avoid the necessity of deciding a number of difficult problems by applying the term "service" to the proposal made by each application and by avoiding situations of mutual exclusivity on channels which are allocated for use by more than one type of service.

With respect to some current allocations, *e.g.*, the General Category channels, the spectrum is allocated to a variety of potential uses, including commercial mobile service and public safety services. However, we think that at para. 33 of the NPRM, the Commission posits a situation which should never occur, because the frequency coordination system should prevent the filing of any mutually exclusive application for use of a General Category channel. If, for example, APCO and NABER were to submit applications for the same channel in the same area on the same day, one for a Police Radio Service station and one for an SMR station, the Commission should dismiss both applications because the frequency coordinators erred by failing to communicate with one another and coordinate only one application or the other. By dismissing both applications to further disposition by the

coordinators, the Commission would avoid the necessity of dealing with a proposed service for which auction would be required and a proposed service which would be exempt from auction.

A Better Plan For Economic Opportunity

We believe that we can suggest an alternative to the Commission's proposals for ensuring that small businesses, rural telcos, and businesses owned by women and minorities are given the opportunity to participate in the provision of spectrum-based services. Most of the alternatives proposed by the Commission would have one of a number of detrimental effects on the public interest, or are not the most likely to fulfill the defined objective of "promoting economic opportunity for the entities enumerated in the statute." While some of the Commission's proposals might be helpful to the enumerated persons, Congress mandated that the Commission ensure the opportunity to participate in the provision of services.

Tax certificates cost the government a part of the revenues which the spectrum auction system was intended to raise and constitute an unnecessary transfer of wealth from taxpayers to enumerated persons which, if that is the intent, should be accomplished by cash disbursements which are unrelated to telecommunications activities. Tax certificates also fail to approach the mandate of ensuring the opportunity to participate in providing service.

The proposed set-aside of a portion of spectrum which is less than the most desirable would be the function equivalent of channeling the enumerated persons to a frequency ghetto.

While the proposed set-aside of spectrum would ensure the opportunity to participate, it would only ensure that opportunity for access to second-rate spectrum, which we don't think is what Congress intended.

An extended payment plan and a reduced level of proof of eligibility make it easier for a person to get started in a business, and we support their use. However, standing alone, they are insufficient to carry out the duty placed on the Commission by Congress.

We suggest the following method as fair, likely to maximum auction revenues, and unlikely to have publicly detrimental side effects. We suggest that the bidders be placed in two categories, namely non-enumerated and enumerated persons. Non-enumerated persons would bid first, until the highest bid among them had been ascertained. At that time, the enumerated persons would be asked if any of them will match or exceed the highest bid. If only one would match the highest bid, then the enumerated bidder's matching bid would be accepted, thereby providing an economic opportunity directly to an enumerated person at a price no higher than that willing to be paid by a non-enumerated person. If two or more enumerated persons would match the highest bid, then those enumerated persons interested in bidding higher would continue to bid until the ultimate highest bid had been reached.

The method we suggest would be fair to all non-enumerated persons who are willing to bid a market price.² It would not cost the United States any loss of revenues in either the auction process or in direct taxes. It would provide an economic opportunity directly to the persons enumerated by Congress at a level of parity with non-enumerated persons. We suggest that, since the method would assure that a market clearing price had been bid, the method would avoid the necessity for the Commission to establish anti-trafficking rules and to scrutinize various transactions and transfer rule waiver requests. We also suggest that this method would be robust on appeal because it could easily be shown to be directly related to the objectives of the Budget Act's revenue goals and social considerations.

Simplest Is Best

Certainly it is true that something less than 50.1 percent ownership of the capital stock of a widely held entity can give effective control. However, to avoid prolonged litigation which could delay the provision of new services to the public, we suggest that the Commission avoid elaborate tests of control.³ Both to help ensure economic opportunity to enumerated persons, and to have the simplest way of reducing chicanery in the process of

² Only those who had hoped to make the winning bid below market price would suffer.

³ The litigation could include an appeal of the Commission's methodology, as well as numerous disputes over who controls, for example, a publicly traded corporation -- the board of directors comprised primarily of women, or a group of black shareholders who hold a total of 40 percent of the capital stock. (The owners of the other 60 percent of the capital stock might have a third view as to who controls the applicant.)

qualifying applicants for enhanced opportunity, the Commission should require that the capital stock of the applicant entity be owned at least 50.1 percent by enumerated persons, or that a majority of the general partners are enumerated persons and that their distributive shares total at least 50.1 percent of the total distributive shares. By requiring actual, positive control, the Commission can both prevent abuses and avoid the need to examine variant situations in lengthy and excruciating detail.

Broadcast Spectrum Should Be Auctioned

Section 309 of the Act does not preclude the Commission from auctioning Broadcast station licenses, nor is it reasonable for the Commission so to interpret it. Had Congress intended to provide such an exemption, it would have done so expressly. In the absence of any such expression in the Act, the Act should be applied in the terms which Congress did express. The service which broadcasters provide, and can be expected to provide in the future fits exactly within the definition of Section 309(j)(2)(A) of the Act. The licensee receives compensation from subscribers (broadcasters call their subscribers "advertisers", but the name is a distinction without a difference) in return for which the licensee enables those subscribers to communicate signals directly to the ultimate recipients of the messages, utilizing frequencies on which the licensee is authorized to operate. There is no genuine distinction between a signal from the subscriber to the ultimate recipient to "call your office" and a signal which says "buy my soap".

The plain meaning of the term "directly" is that the signal reaches, or is capable of reaching, the intended recipient or recipients directly, and does not require any further, intermediating facility.⁴ Since public paging signals are nearly always delayed between the time that the subscriber delivers them and the time that they are transmitted, solely for the convenience of the licensee, the fact that a television commercial message is transmitted on a delayed basis, compared to the time that it was submitted for transmission by the subscriber, does not distinguish a Broadcast service from public paging service for purposes of applying Section 309(j)(2)(A) of the Act.

The Commission should determine that Broadcasting is a service to which the auction provisions apply. When the Commission is ready to accept Advanced Television (ATV) applications, it should require that they be granted by auction.⁵ For purposes of auctioning initial licenses for any new AM, FM, or Television Broadcast spectrum use, the Commission should establish a minimum bid per megahertz of spectrum, as determined by the winning bid for PCS service in the same MTA. In that way, if no one is willing to bid as much per megahertz for ATV use of spectrum as was bid for PCS use of spectrum in a given MTA,

⁴ For that reason, we suggest that the Commission's tentative conclusion is in error at paragraph 29 of its NPRM. The cellular subscriber does not receive the signal of a microwave link station directly, so a license for a link station which does not communicate "directly" with the ultimate recipient of the service should not be subject to auction.

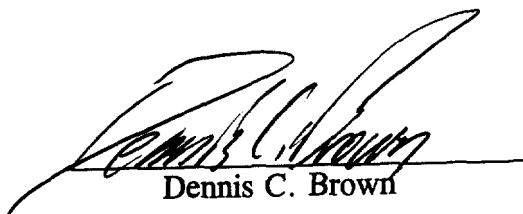
⁵ Where the Commission had allocated only one channel per market to ATV, and there was only one applicant eligible for it, or in a market in which more than one channel was allocated but only one eligible applicant applied, then the channel would be assigned directly to that applicant, without the necessity of an auction.

that should be the market's direct signal to the Commission that the Commission should reallocate the spectrum to a different use, until it finds the highest and best use for which the market is willing to pay for a megahertz of spectrum.

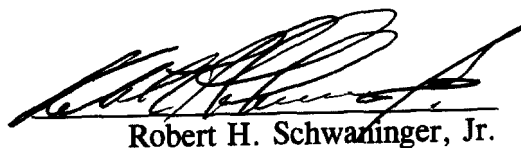
Conclusion

For all the foregoing reasons, we respectfully request that the Commission adopt final rules in accord with our foregoing suggestions.

Respectfully submitted,



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